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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT AND JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Petitioners,

v.

JOHN H. MCBRYDE, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners respectfully submit this Reply Memorandum primarily addressing the profoundly disturbing proposition advanced as a suggestion in the Memorandum for the United States ("U.S. Mem.").

I. Respondent's Re-interpretation of the Decision Below Does Not Eliminate the Conflict with the Contrary Decisions of this Court.

First, in this Brief in Opposition ("Br. Opp."), Respondent attempts to suggest that the decision of the Court of Appeals did not limit the authority of circuit judicial councils to remedy judicial misconduct pursuant to 28 U.S.C. § 332 (1998) (Br. Opp. 7), but the Court of Appeals' decision specifically provides that "[w]hile § 332 grants the judicial councils some authority to deal with judicial misconduct, *the Judicial Coun-*

cil's authority to impose discipline based on its finding of misconduct is limited to that power conferred by § 372(c)." (Petition for Writ of Certiorari ("Cert. Pet.") 46a; emphasis supplied.)

Second, although Respondent contends that there is an alternative and unchallenged holding in the Court of Appeals' decision which supports the decision regardless of the interpretation of Section 332, none is apparent.

Third, Respondent (who relies upon the decision below construing Section 372(c) even though he contends in this Court that the statute is unconstitutional, Br. Opp. 15 n.4) asserts that the decision below was not contrary to this Court's numerous decisions involving statutory construction, especially "implied repeals," because Section 372 and Section 332 were in effect adopted simultaneously. This suggestion is refuted by the legislative evolution from 1939 to 1990 set forth in the Petition, as well as the Court of Appeals' statements that Section 372 "limit[s]" or "eliminate[s]" the power of the circuit councils to discipline judges under Section 332. (Cert. Pet. 46a, 52a.)

Fourth, Respondent argues that the decision below does not conflict with *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), because the relevant passage is supposedly dicta, a position not taken by the Court of Appeals, which acknowledged that it supports Petitioners' position. (Cert. Pet. 46a.)

Finally, Respondent's attempts to demonstrate Article III standing (to challenge the order transferring two cases because his reputation was supposedly injured) are unavailing, nor is any justification advanced for the creation of this species of litigation within the Judicial Branch.

In the end, contrary to Respondent's suggestion (Br. Opp. 13-16), the decision of the Court of Appeals will have pernicious

consequences to the effective administration of justice. This decision cuts off the authority of a circuit council to address judicial misconduct under Section 332 and confers Article III standing on a district judge to initiate litigation against a circuit council despite the clear requirement of Section 332(d)(2) that "[a]ll judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2). By so tying the hands of circuit judicial councils, the Court of Appeals' decision ultimately makes intervention into the process of judicial governance by the coordinate Branches more likely, thereby threatening the principle of judicial independence.

II. The Suggestion of the Acting Solicitor General That Section 518(a) Applies to Litigation Within the Article I or Article III Branches or Between Branches Is Unsupportable.

The Acting Solicitor General takes no position on the merits of this dispute. She justifies taking no position precisely because the dispute is one within "a coordinate Branch of the government." (U.S. Mem. 3.) Nevertheless, this Article II officer suggests that 28 U.S.C. § 518(a) (1998) applies to this case, exclusively involving Article III persons. Petitioners' concerns are heightened by the alternative dispositions that the Acting Solicitor General advances: request briefing of Section 518(a) issues if certiorari is granted, or consider Section 518(a) as a factor in denying certiorari. The former appears to be inconsistent with some recent "Branch litigation," and the latter is inconsistent with the dispositions in *United States v. Providence Journal*, 485 U.S. 693 (1988) and *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994).

But the Office of the Solicitor General cannot be said to be disinterested on this issue. There is a "Greeks bearing gifts"

quality to the Memorandum: it overtly foregoes a lesser power (to comment on the merits of this particular case), while covertly asserting an infinitely greater and, we submit pernicious, power — the absolute, institutional control of Article III (and Article I) persons' access to this Court in, and this Court's ability to address, inter-Branch and intra-Branch litigation. To the best of our knowledge, the Office of the Solicitor General has never before surfaced the suggestion that it has this power over these classes of cases, despite opportunities to do so both before and even after *Providence Journal* and *FEC*. Petitioners (all Article III judges) respectfully submit that any suggestion that this Court's ability to hear inter-Branch or intra-Branch litigation may be subject to the unreviewable discretion of one Article II officer is of profound importance.

Section 518(a) is simply not applicable in the context of intra-Branch or inter-Branch litigation. The present dispute is between, on the one hand, an Article III administrative body composed of nineteen Article III judges with supervisory authority over a judicial circuit and one Article III district court judge with supervisory and administrative authority, and on the other hand, an Article III judge in his official capacity. The conclusion that Section 518(a) is inapplicable is consistent with both the reasoning of the Court in *Providence Journal* and *FEC* and the legislative genesis of the current Section 518(a). Moreover, the suggestion that Section 518(a) might be interpreted to make Article I or Article III persons or entities dependent upon the largess of an Article II officer before a matter could be brought to this Court raises serious constitutional questions of separation of powers.

In *Providence Journal* and *FEC*, this Court applied Section 518(a) in criminal and civil actions to enforce laws of the United States. In both cases, the "United States" as broadly defined was on one side of the dispute and a private party was

on the other. In such litigation with private parties, *Providence Journal* and *FEC* stand for the sensible and simple proposition that there is only "one 'United States' that may appear before this Court." *Providence Journal*, 485 U.S. at 701.

In this matter, in contrast, both petitioners *and* respondent are before this Court in their official governmental capacities. Both are, in the broadest practical and constitutional senses, the "United States." Simply put, the "United States" is on both sides of the "v." in this matter.

The intra-Branch nature of this matter simply takes this case outside of the scope of Section 518(a). Indeed, it is fair to observe that the Court held that Section 518(a) applies *only* where there is "one 'United States' that may appear before this Court," *Providence Journal*, 485 U.S. at 701, not where, as here, there are two "United States" from different Branches or within a single Branch.

The legislative genesis of Section 518(a), which this Court left unexplored in *Providence Journal* and *FEC*, also does not remotely suggest that Congress intended that the Attorney General control this Court's access to inter-Branch or intra-Branch litigation. The ultimate origin of what is now Section 518(a) is found in Section 35 of the Judiciary Act of 1789.

> "*And there shall also be appointed a meet person, learned in the law, to act as attorney general for the United States . . . whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned*, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments . . . ."

The Attorney General's job was simply to advise the President and Cabinet officers and, when suits in the Supreme Court required the presence of the United States, to act as the Federal government's lawyer. There is nothing in the language remotely suggesting, we submit, that the First Congress even contemplated inter-Branch or intra-Branch litigation, much less intended that the Attorney General would control access by the Legislative or Judicial Branches to this Court in such cases. Indeed, we note that the statute preceded by three years what might be called the first separation of powers case, *Hayburn's Case*, 2 U.S. 408 (1792).

The evolution of Section 35 to what is now Section 518(a) provides no indication that Congress intended that the Attorney General control all intra- and inter-Branch litigation. In 1870, Congress created the United States Department of Justice. Section 2 of this Act created the office of the Solicitor General, and Section 5 of this Act provided for delegation of work from the Attorney General to the Solicitor General. Section 5 also provided that the Attorney General and the Solicitor General would argue any case in which "the government is interested" in the Court of Claims, and in appeals from the Court of Claims to the Supreme Court to argue them in this Court "as in other cases in which the United States is interested." Congress did not intend by this Act to expand or alter the role of the Attorney General in cases before the Supreme Court not coming from the Court of Claims, but simply referred back to those powers already set out in the Judiciary Act of 1789.

In 1873, Congress consolidated the prior legislation relating to the authority of the Attorney General and the Solicitor General in R.S. § 359, which read as follows:

> "Except when the Attorney General in particular cases otherwise directs, *the Attorney General and Solicitor-*

> *General shall conduct and argue suits and writs of error and appeals in the Supreme Court* and suits in the Court of Claims *in which the United States is interested* . . . ."

There is nothing in the legislative history of this provision to indicate any intention on the part of Congress that its enactment would give the Attorney General or Solicitor General authority to control inter- or intra-Branch litigation in this Court.

The provision underwent several other minor amendments over the next hundred years. A 1928 Act removed the reference to "writs of error."[1] In 1966, the present structure of Section 518 was adopted, with two parts: 518(a), which concerns this Court, and 518(b), which deals with intervention by the Attorney General in cases where United States interests require it.[2] Various courts were added as the court structure of the United States changed.[3] But the basic structure has remained the same since 1789. At no point from its humble origin in 1789 to its current incarnation as Section 518(a) did the statutory language or legislative context remotely suggest the actual congressional intention to make inter- or intra-Branch litigation in the Supreme Court subject to the control of the Attorney General.

The present dispute between petitioners and respondent is a dispute between entities within Article III. The suggestion is made that the statute requires that petitioners, Article III entities, obtain permission of an Article II official before they

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[1] Act of Jan. 31, 1928, ch. 14 § 1, 45 Stat. 54.

[2] *See* An Act to enact Title 5, United States Code, Pub. L. 89-554, § 518, 80 Stat. 613-14 (1966).

[3] *See, e.g.*, Customs Court Act of 1980, Pub. L. 96-417, Title V, § 503, 94 Stat. 1743 (1980) (adding "Court of International Trade").

may request this Court to correct an error of an Article III court. Petitioners emphasize that this suggestion itself raises substantial separation of powers concerns.

Only in recent decades have substantial numbers of intra-Branch and inter-Branch disputes, many involving separation of powers issues, been decided by this Court. In those cases, as in this, the "United States" was on both sides of a concrete, deadly serious, and important dispute usually of lasting constitutional significance. Yet there was not the slightest indication or even suggestion that the Attorney General had, by virtue of Section 518(a), absolute control over access to this Court (although he or she may have represented one party).[4]

To suggest that Section 518(a) may be construed to apply to intra- or inter-Branch litigation is to suggest that absolute discretion be devolved on one Article II officer to dictate whether a petition for certiorari may be filed by an Article III (or Article I) person. In effect, the Attorney General could pick the winner in any such dispute. That power, of awesome significance to our system of government, deserves far more open and explicit justification than the suggestion by the potential recipient thereof.[5]

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[4] *See, e.g., Raines v. Byrd*, 117 S. Ct. 2312 (1997); *Dalton v. Specter*, 511 U.S. 462 (1994); *Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319 (1994); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919, 939 (1983); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Gravel v. United States*, 408 U.S. 606 (1972); *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970); *Will v. United States*, 389 U.S. 90, 91-93 (1967).

[5] Moreover, the consequences of such an application of Section 518(a) could extend beyond cases before this Court and extend to *all* Article III courts. The same language used in 28 U.S.C. § 518 — "United States is interested" — also appears in 28 U.S.C. § 516 (1993).

Subjecting Article I and Article III persons and entities to the absolute control of an Article II officer in litigation within Article III and with other Branches would raise substantial separation of power concerns. The Constitution "mandates" that each Branch of government remain "entirely free from the control or coercive influence, direct or indirect, of either of the others . . . ." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)). Subordinating the Judicial Council, composed as it is of nineteen Article III judges, and Petitioner Buchmeyer to the absolute authority of the Attorney General and Solicitor General in the context of an intra-Branch dispute involving another Article III judge would create a comparable constitutional problem.

CONCLUSION

The issues presented in the Petition are of substantial importance to the Judicial Branch. As the Judicial Branch continues to grow in numbers, responsibilities, and complexity, the authority of circuit judicial councils to remedy judicial misconduct will similarly grow in significance. The continued ability of the Judicial Branch to govern itself is of undisputed importance. This Court often waits for the development of unequivocal conflicts between circuits or what may be viewed as ideal factual contexts before addressing some areas of the law. The matters raised in the present Petition are of central and ongoing significance to the administration of the Judicial Branch and should be addressed now, in the best interests of this Branch.

The Court should not decline to review of the Petition because of the new issue injected into this case by the Acting Solicitor General. We do not deny the interpretation of Section 518(a) suggested by the Acting Solicitor General is deeply

troubling, if not potentially insidious. But the addition of another issue of importance to the Judicial Branch should not cause this Court to avoid either issue. Petitioners, as Article III judges, request that this Court reject the suggestion that the authority of the Office of the Solicitor General should be *implicitly and incrementally* enhanced through the discretionary denial of certiorari. This issue, of importance to persons and entities within both Article III and Article I Branches, should be confronted and addressed frankly and openly.

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May 20, 1998

Respectfully Submitted,

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